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Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 207.

THE EAST ALABAMA RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN DOE ex dem. DANIEL W. VISSCHER, KATY LOU VISSCHER, ANNA DAN VISSCHER, GEORGE GLEN VISSCHER, HENRY BECKMAN VISSCHER, A. L. WOODWARD and ABNER M. LOCKETT,
Defendants in Error.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

Brief for Plaintiff in Error.

By EDWARD PATTERSON,
HENRY C. SEMPLE,
Counsel for Plaintiff in Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

Brief for the Plaintiffs in Error.

STATEMENT OF THE CASE.

At the Spring Term, 1881, of the Circuit Court of Chambers County, Alabama, the defendants in error commenced a common law action of ejectment in the old form against the plaintiff in error, as well as Barnes, Ray and Burnworth, for the following described premises, viz.: "A certain tract or parcel of land, being the railroad bed of the railroad formerly known and called the East Alabama and Cincinnati Railroad, from La Fayette to the county line of

Lee County, together with all the land contiguous to said roadbed on each side thereof to the distance of 75 feet from the centre thereof, said railroad being now known and called as the East Alabama Railway, with the appurtenances, situate in the County of Chambers aforesaid."

The declaration contains four counts, laying four several demises: 1. From Daniel W. Visscher; 2, from Daniel W. Visscher, Katy Lou Visscher, Anna Dan Visscher, George Glen Visscher, Henry Beckman Visscher; 3, from A. L. Woodward; 4, from Abner M. Lockett.

(See declaration Transcript, pp. 1, 2 and 3.)

Notice of the declaration having been given by the casual ejector, Richard Roe, to the said defendant, the East Alabama Railway Company, it appeared and entered into the consent rule and pleaded not guilty, and by agreement all other parties were struck out of the record (Tr., p. 4).

Thereupon the plaintiff in error filed a petition and bond for the removal of the cause into the Circuit Court of the United States for the Middle District of Alabama, and the cause was removed (Tr., pp. 5 and 6).

At the November Term, 1881, it was tried on a suggestion of permanent improvements after three years' adverse possession, and the plea of not guilty and a verdict and judgment were had for the plaintiff below. A writ of error to reverse which judgment was sued out by the defendant, and supersedeas bond given and supersedeas awarded.

The bill of exceptions sets out all the evidence in the cause (Tr., pp. 14–24).

From the bill of exceptions it appears that the La Fayette Branch R.R. Co. was incorporated by act of the Legislature of Alabama in the year 1848 (Tr., p. 28). That such act was amended in 1854 (Tr., p. 29), and again amended in 1860 and the name of the railroad corporation changed to the Opelika & Oxford R.R. Co. (Tr. pp. 29–30).

The powers conferred upon the corporation were the ordinary powers to construct a railroad from Opelika to Ox-

ford, Ala.—the *locus in quo* is included in the route—to condemn lands, etc., etc.

It organized by electing officers and continuing to do so, until 1861, when one Richards was elected President at the last meeting of the corporation held (Tr., p. 14).

Said railroad company acquired rights of way from all the proprietors of the soil from near Opelika to La Fayette in Chambers County, Alabama, by deeds from all said proprietors which were exact copies of the one from Mrs. McLemore (Ex. B, Tr. pp. 30-31) except in the description of the land over which the road was to pass, and except through a section of land in Chambers County (one square mile) owned by one Daniel Robinson, through which the said roadbed sued for runs in Chambers County, Alabama, and that as to the right of way through this section of land the said Opelika & Oxford R.R. Co. had caused the same character of rights and right of way conveyed by the deeds of Mrs. McLemore and others to be condemned to its use under said charter or acts of the Legislature, but that an appeal having been taken the company did not pay the sum assessed for said right of way to the owner, Robinson, as the war came on, and the amount so assessed was paid to him by the receiver in the Chancery Court in the case of Barnes & Clews, Trustees *vs.* Colt, Boyle and others, hereinafter referred to.

In the year 1860 the Opelika & Oxford R.R. Co. employed engineers who laid out and staked off the full right of way conveyed by said deeds through all of said lands, including the lands of said Robinson, and cut out the width of the right of way through woods when the line passed through woods, and they made contracts with contractors for grading and culverting a railroad along said right of way. Said contractors built for said company a great deal of the grading and culverting of said railroad company along said right of way, and all the work was done on the right of way thus staked out, but no other work was done on it except the said culverting and grading, and this was not continuous through the whole line in Chambers

County sued for, but there were several intervals where no work of grading and culverting was done, and the said company was in the undisturbed possession of the whole of said right of way (Tr., pp. 14–15).

It further appears by the bill of exceptions "that said company became embarassed for want of means during the war, and being without any means of prosecuting the work it ceased before July, 1861, to do any further work on said line, leaving it incomplete as to grading and culverting, and no work was done by it afterward on said line, and it had after July, 1861, no means of prosecuting the work" (Tr., p. 15). It was, however, proved "that Richards, the president last elected, did, as late as the year 1863, remove at a small expense to himself individually some logs which had lodged in one of the culverts, because, as he declared, it might save the culvert and grading from injury, and he hoped the company might be able some day to resume work, and that he looked over the work from time to time" (Tr., p. 15). "It was shown by said Richards that no meeting of the directors was held after July, 1861, and none of the stockholders, and that no corporate act was done by either directors or stockholders after July, 1861, as far as witness recollected, and that the company was entirely without means to prosecute the building of said road any farther" (Tr., p. 15).

It was also shown by the testimony of said Richards "that one Abner M. Lockett and D. W. & J. G. Visscher, partners (the latter partners) were contractors of said company in the execution of said work of said line, and that the company being indebted to each of said contractors for work done by them, they separately (Lockett and the Visschers) instituted two suits for the recovery of said balances in the year 1864 in the Circuit Court of Chambers County, Alabama, against said company, and served the process on him as president, as shown by Exhibits C. and D. (pp. 31–35 and 36–39, Transcript). That he, being a lawyer, examined the demands sued for, and appeared as attorney of said company to defend said suits in order to

insist on certain payments or off-sets to said demands, and his claims to said off-sets or demands being allowed, judgment was rendered for the balance of said demands as appears by the transcripts of said suits, he being satisfied that the demands were just (Tr., pp. 15–16).

Plaintiff then offered in evidence the two transcripts marked C. and D. (see Tr., pp. 31 to 39) with the deed of Kellam, Sheriff of Chambers County, to Woodward and the Visschers (Ex. E., Tr., pp. 40, 41), with evidence that the deed was not in his custody (Tr., p. 16). Defendant objected to the evidence, and plaintiff withdrew the offer, and offered evidence to connect defendant with the title which the plaintiff sought to establish by said transcripts.

Thereupon D. W. Visscher was produced as a witness, and presented an agreement in writing (copied in Trans., pp. 44 to 48), and proved the execution thereof by Pennington, president of the Eufaula, Opelika, Oxford & Guntersville Railroad Company, afterwards called the East Alabama & Cincinnati Railroad Company, and that said company acted on it and recognized it.

The agreement above referred to (Ex. F., Tr., pp. 44 to 48) is one by which D. W. & J. G. Visscher agreed with the Eufaula, Opelika, Oxford & Guntersville R.R. Co. substantially "to form, prepare and finish the clearing, grading, masonry, trestle-work, cattle-guards, road and farm crossings, track laying, including switches, frogs and turnouts, warehouses, water tanks with fixtures complete, including the furnishing of materials, and all other things necessary *to complete the road ready for running trains, except the iron materials which go into the superstructure of the road* as rails," &c., &c., for 20 miles, from two miles north of Opelika to a point beyond La Fayette in Chambers County. The agreement then recites the terms of compensation, the duties of the contractors and of the corporation to each other, the times of performance, &c.,&c., and it contains the following provisions, viz.: "And upon the completion of the said twenty miles (20) and the payment of the amount of said contract the said D. W. Visscher shall

transfer to the said company *all right and title vested in him* to all franchises, *right of way* or other property belonging to or pertaining to the said road under the old organization known as the Opelika & Oxford R.R."

It further appears by the bill of exceptions that some time before the date of said contract (6th April, 1870) the witness Visscher was invited by Pennington to see him relative to purchasing for his company his grading and right of way to La Fayette. He saw Pennington, who said he (P.) could build by the side of Visscher's line, but would like to purchase it, and after some time agreed that the Visschers should go to work completing the grading, and that Pennington's company would furnish the means to pay for the work as it progressed, as they wished to show that they were working with a view to obtaining county subsubscriptions: he then began the work under the verbal agreement—that the writing, Ex. F., should soon be executed, and the work went on under the verbal agreement until the Contract F. was executed, when he went on under that contract until the work was completed to the town of La Fayette—that they were delayed in completing by the failure of the company to make payments as stipulated, and to furnish engineers, &c., but it was completed and accepted as done according to the contract, about May 3, 1871 (Tr., pp. 16, 17). That while they were at work, and before they had completed the grading to La Fayette, the engineer told him that he claimed the right to let out the work beyond La Fayette (some 3½ miles) to another man, and had so let it out; that he insisted he had a right under his contract to this work, and was provided with the outfit to do it, but he was driven off by force and firearms and not allowed to do it. The grading had then been done and the road was nearly ready for the cross-ties and iron, having been done by another contractor. That in all he had been paid only abont $90,000, including about $30,000 of stock issued by the company, $24,000 to him and $6,000 to V , at his request. He also testified that Pennington told him he expected to get the State's endorsement of

the company's bonds, and that said contract was entered into with a view of procuring the State's endorsement of the company's bonds in respect of the twenty miles of road embraced in the contract with him, but that he had never consented to said indorsment and did not intend to consent to it till the payment of the money to him under it (testimony of Visscher, Tr., pp. 16, 17).

Richards, the President of the O. & O. Co., also testified "That after the Sheriff's sale hereafter set out he turned over to the purchasers the land and house and lot and rented it out for the Visschers as their agent, and he abandoned to them or turned over to them the line of culverting and grading as far as he could do so; that is, that he exercised no further authority over it and the Opelika & Oxford R.R. Co. made no further claim to it" (Tr., p. 17.)

The plaintiffs then offered in evidence a bill in chancery filed by the defendant in Chancery Court of Etowah County, Alabama *vs.* The Tennessee and Corsa R.R. Co. (marked Ex. X, and copied in Transcript, pp. 81 to 206), for the purpose of showing the proceedings in the case of Barnes & Clews *vs.* Colt, Boyle *et al.*; the sale of the East Ala. & Cincinnati R.R. under said decree, the purchase by Livingston & Irvin, the conveyance by the Register to them, the organization of the East Alabama R.R. Co. (the defendant below), the conveyance to that corporation by Livingston & Irvin (Tr., pp. 17 and 18).

The plaintiff showed the annual value of the rents for the twelve miles in Chambers County to be $200 to $400 per mile (Tr., p. 18).

Thereupon (Tr., p. 18) the plaintiff again offered the transcripts of the proceedings in Chambers Circuit Court, copied in Tr., pp. 31–36 and 36–44, together with the deed, Kellam, Sheriff (Tr., pp. 40–41). To each of these the defendant separately objected as illegal and irrelevant evidence, and also on the ground that they tended to show the sale under execution and conveyance by the Sheriff of a mere easement or right of way not the subject of an ejectment, but the Court overruled each of these objections and allowed each

of said transcripts C, D and E to be read in evidence against its objections, to which rulings of the Court the defendant separately excepted (Tr., p. 18).

There was also evidence that the plaintiff gave notice before and at the time of the sale in the case of Barnes & Clews *vs.* Colt, Kelley *et al.*, that plaintiff claimed a lien on the road from Opelika to La Fayette for a large amount, and that they had never parted with the legal title to that property (Tr., p. 18).

The foregoing was substantially the case for the plaintiff.

Thereupon the defendant offered evidence that the East Alabama & Cincinnati R.R. Co had completed its line from where the Visschers stopped work, 3 or 4 miles north of La Fayette; that besides the money paid the Visschers for their work the company had laid down the iron at a cost of $8,000 per mile, and had done much other work beyond that point and towards Guntersville.

The defendant then offered in evidence the transcript of the Circuit Court of the U. S. at Mobile (marked G. Tr., pp. 48 to 67), showing the adjudication against D. W. & J. Visscher of the very claim set up by plaintiff in this suit. To the admission of this evidence the plaintiff objected, and it was excluded by the Court, to which ruling the defendant excepted (Tr., p. 19).

The defendant then read in evidence the whole of the transcript from the Chancery Court of Etowah County, the bill in which had been offered by the plaintiff (Tr., pp. 81 to 205).

From this transcript it appeared that the East Alabama & Cincinnati R.R. Co. had been in 1873 decreed a bankrupt; that being in possession of the property sued for the assignees took possession thereof; that they remained in possession until 1874, when it was sold by decree of the Court as property of the bankrupt, and was purchased by Colt, Keely, Murphy and Boyle, who entered under the assignees' deed and continued in possession until 1878, when they were dispossessed by the Receiver in the case of Barnes *vs.*

Colt *et al.* That Thornton, the Receiver, held until the sale under the decree to Livingston & Irvin, and they held until they conveyed to defendant (Tr., p. 19).

Defendant then offered evidence that the East Alabama & Cincinnati R.R. Co. had, after the completion of its road for the first twenty miles from near Opelika to a point beyond La Fayette, completed 5 miles of its road from Altala to Gadsden, not continuously connected with said 20 miles, but along its chartered route (Tr., pp. 19–20).

This was all the evidence in the cause, whereupon the Court gave to the jury the following charges, viz.:

1. That if the jury believe from the evidence that the Eufaula, Opelika, Oxford & Gunthersville R.R. Co., whose name was afterwards changed to the East Alabama & Cincinnati R.R. Co., entered into a written contract with D. W. & J. G. Visscher (a copy of which is set out in the bill of exceptions as Exhibit F.), and under said contract were let into possession by the Visschers of the *route* described in the deeds from McLemore and others described in the evidence, and the said corporation failed to perform its part of said contract, and the Visschers did perform it so far as permitted by said corporation to do so, and the corporation failed to make the full payments due to said Visschers under said contract; that then the said corporation and all persons claiming under it are estopped from setting up any title in the premises sued for adverse to said Visschers, and their possession under said contract was not adverse.

2. The Court then charged the jury that if they believed the facts set forth in its charge number one that the claim for permanent improvements made by defendants and those under whom they claimed, could not be allowed.

3. The Court also charged the jury that the property conveyed by the deed of Kellam, Sheriff, a copy of which is

set out in the bill of exceptions, was the subject of levy and sale under execution, and that the objection made by the defendants that it was only an easement and not the subject of a levy and sale under execution was not well founded.

4. The Court then charged the jury that if it found for the plaintiff their verdict should be: We, the jury, find for the plaintiffs all the property sued for as described in the complaint, and assess the damages at $, the amount of the rent proved.

The Court then, at the request of the plaintiff, gave each of the several charges A, B, C, D, E, F and G. They are printed in the transcript of record, at pp. 20, 21 and 22, and are not copied here as they are set out in full in the assignment of errors contained in this brief.

The defendant separately excepted to each of the said charges (Tr., p. 22).

Defendant then asked the Court to give the charges separately marked I., II., V., X., Y, set forth in full at pages 22, 23, 24 of the transcript of record. They are not inserted here as they appear in full in the assignment of errors in this brief, and the Court separately and successively refused to give each of said charges so asked by the defendant, and to each refusal to give said charges the defendant separately excepted.

Assignment of Errors.

And now comes the plaintiff in error and assigns for error in the proceedings and judgment in said cause that the Court erred.

I.

In admitting in evidence each of the transcripts C, D and E against the separate objections of the defendant to the admission of each of said transcripts (Tr., p. 18).

These transcripts are too voluminous to insert here, but C (Tr., pp. 31 to 35) showed a judgment in favor of Abner M. Lockett *vs.* The Opelika and Oxford R.R. Co. in the Circuit Court of Chambers, County Alabama, on the 26th October, 1866, for $14,457.21 and costs of suit (Tr., pp. 32–3). Statement of issue of execution as on a judgment between same parties and of same date, but for $12,383.83 instead of $14,457.21, the levy of this *fi. fa.* by Kellam, Sheriff of Chambers County, on a house and lot, some surveying instruments and also "the right of way to the Opelika and Oxford R.R., so far as the right of way has been obtained," the stoppage of proceedings under this *fi. fa.* by order of plaintiff's attorney on the 12th April, 1867.

The issuance of another execution in favor of Lockett on the 8th May, 1867, and its delivery to Kellam, Sheriff, describing the judgment as for $12,383.83 instead of $14,457.21. The levy on the same day of this execution by the Sheriff on a house and lot and surveying instruments, "and also the right of way to the Opelika and Oxford R.R., so far as the right of way has been obtained to edge of Lee County" (Tr., pp. 33–4). The return of the execution that the "railroad and house and lot," &c., were sold to the highest bidder on the 1st Monday of June, 1867, to Lockett & Visscher and Woodward, and the money applied equally to this case and the case of D. W. & J. G. Visscher. The transcript shows also other executions to Sheriff of Lee County, having no reference to this case. The transcript D. showed a judgment on the 24th October, 1866, in the Circuit Court of Chambers Co., Alabama, in favor of D. W. & J. G. Visscher *v.* The Opelika and Oxford R.R. Co. for $12,383.83 and costs; the issuance of a *fi. fa.*, 7th November, 1866, on a judgment between same parties for $14,457.21, its levy in same terms as in C, the stay of proceedings by order of plaintiff's attorney, the issuance of another execution in the same terms on the 8th May, 1867, to Killam, Sheriff, the levy by him in same terms as in the execution in favor of Lockett, except that the words "so far as the right of way has been obtained" are omitted,

and a similar return of sale to that in the Lockett case. Also some proceedings on executions to a different county, and not connected with this case.

The Transcript E. is a deed made by Kellam, Sheriff of Chambers County, to D. W. & J. G. Visscher and A. L. Woodward, which recites the judgment as recited in the executions and not in the transcript of judgments—the issuance of executions, their levy by him not in accordance with his return on the executions—but as follows: "Did levy the same on the following tract of land as the property of the said railroad comsany, to wit: the right of way to Opelika and Oxford R.R. Co., so far as the right of way has been obtained from La Fayette to the line of Lee County, lying and being in said County of Chambers; "and whereas, after having duly advertised said tract of land, or said roadbed, for sale in the mode prescribed by law," did sell, &c., and does convey the said tract of land, or said roadbed, and specifically conveys the following, "to wit, the right to the Opelika and Oxford R.R. Co., so far as the right *a* way has been obtained from La Fayette to the edge of Lee County."

II.

In excluding from the jury the transcripts offered by defendant from the Circuit Court of the United States (*for these papers in full see Tr., pp.* 48 *to* 67).

In substance, they showed a petition by D. W. & J. G. Visscher to the Circuit Court of the United States to suspend the sale of the railroad of the East Alabama and Cincinnati R.R. Co. ordered to be sold by the decree of the District Judge sitting in Bankruptcy in the case made by the plaintiff in this suit (*Tr.*, p. 48). That on the 15th May, 1873, the District Judge holding the Circuit Court of the United States at Mobile, sustained a demurrer to and dismissed the petition (*Tr.*, p. 66), that on the 22d May, 1873, a Justice of the Supreme Court of the United States set aside this order and continued the cause; that on the 26th day of

May, 1873, his order was set aside by the Circuit Court of the United States and the order of the District Court made on the 15th May re-instated.

III.

In giving the charge numbered 1 as follows:

1. "That if the jury believe from the evidence that the Eufaula, Opelika, Oxford & Guntersville R.R. Co., whose name was afterwards changed to that of the East Alabama & Cincinnati R.R. Co. entered into the written contract with D. W. & J. G. Visscher, a copy of which is set out in the bill of exceptions as Exhibit F., and under the said contract were let into possession by the Visschers of the route described in the deeds from McLemore and others, described in the evidence, and the said corporation failed to perform its part of the said contract and the Visschers did perform it so far as allowed by the said corporation to do so, and the corporation failed to make the full payments due to said Visshers under said contract, that then the said corporation and all persons claiming under it are estopped from setting up any title in the premises sued for adverse to said Visschers and their possession under said contract was not adverse.

IV.

In giving the charge numbered 3 as follows:

3. "The Court also charged this jury that the property conveyed by the deed of Kellam, Sheriff (a copy of which is set out in the bill of exceptions), was the subject of levy and sale under execution, and that the objection made by defendant, that it was only an easement and not the subject of a levy and sale under execution was not well founded.

V.

In giving the charge numbered 4, as follows:

"4. The Court then charged the jury that if it found for the plaintiffs their verdict should be: We, the jury, find for the plaintiffs all the property sued for, as described in the complaint, and assess the damages at $, the amount of the rent proved."

VI.

In giving the charge marked A, as follows:

"If the Opelika & Oxford R.R. in and before 1851 organized under its charter and went to work grading its roadbed and procured deeds to its right of way from every landowner on its line except one, and had the right of way over that one condemned to its use, and actually staked out and performed substantial work in grading on the line of said road and exercised control over its entire line from La Fayette to its terminus near Opelika, then they acquired such a right in the land and such right of way as would be subject to levy and sale under execution, and the purchaser under execution sale under a valid judgment acquired such legal right and title as the said O. & O. R.R. had."

VII.

In giving the charge marked B, as follows:

"That if such purchasers or either of them under an agreement to sell said way to the East Ala. & Cincinnati R.R. Co. let said E. A. & C. R.R. Co. into possession, such entry under such contract is a recognition and admission of plaintiffs' title which will be binding on said E. A. & C. R.R. and those claiming under or from them."

VIII.

In giving the charge marked "C," as follows:

"If the jury believe that the Opelika and Oxford R.R. Co. were in possession of the land described in plaintiffs' complaint, claiming it as its own for the purpose of constructing its road and exercising acts of ownership of it and improving it before the same was levied on or sold by the Sheriff of Chambers County, this would be *prima facie* evidence of such a title as might be sold under execution."

IX.

In giving the charge marked D, as follows:

"If the jury believe that the plaintiffs or either of them went into possession of the land mentioned in the complaint after the Sheriff's sale and before entry by defendants or by those under whom they claim *prima facie* evidence of title in such plaintiff."

X.

In giving the charge marked G, as follows:

"If under the instructions of the Court the jury believe from the evidence that at the commencement of this suit the plaintiffs had the legal title to and are entitled to recover the whole of the land described in the complaint, or to the whole except that which was originally the property of Daniel Robinson, then that legal title cannot be defeated in this suit by any matter of estoppel alleged or asserted by the defendant in this case."

XI.

In refusing to give the Charge I. asked for by the defendant as follows:

"We ask the Court to charge the jury that if they believe that the Opelika & Oxford Railroad Company had no

other title to the property in question than a mere right to build and operate a railroad on the lands of others, and that it was left in 1861 without any means of building a railroad, when it had not built any railroad, and had done no other work than partial grading and embankments and culverting, and that it had no means of completing the building of a railroad, and had in 1867 no means or expectation of building a railroad on the line, and had no corporate action from 1861 to 1867, and had abandoned the building of any railroad; that then the right of way reverted to the owners of the soil, and there was nothing left in it subject to sale under execution."

XII.

In refusing to give the Charge II. asked for by the defendant as follows:

"If the jury believe from the evidence that the Opelika & Oxford Railroad Company had no other title at any time than a right of way from La Fayette, in Chambers County, to some point near Opelika, together with the grading and culverting along said right of way, constructed at intervals along said route by them in the course of their efforts to build a railroad along said right of way left incomplete in 1861, and that the Visschers had acquired this by the purchase at the Sheriff's sale, and that the Visschers in 1870 entered into the contract in evidence with the Eufaula, Opelika, Oxford & Guntersville Railroad Company, and that the name of the railroad company last named was changed into that of the East Alabama & Cincinnati Railroad Company, and that under said contract they built for said railroad company the whole road to La Fayette on the whole route claimed by them, and received only partial payment therefor, and the last company refused to allow them t build that part of the line contracted for beyond La Fayet and beyond the line of the route which the Visschers ha so acquired, and the East Alabama & Cincinnati Railroac Company built through others the route beyond La Fayette

which the Visschers contracted to build for them; then the refusal and failure of the East Alabama & Cincinnati Railroad Company to allow the Visschers to complete said building, and its failure or refusal to complete the payments stipulated for, does not authorize an action of ejectment by the Visschers for the recovery of the property described in the Sheriff's deed from the East Alabama & Cincinnati Railroad Company or from anyone holding under them."

XIII.

In refusing to give the charge marked V, asked for by the defendant as follows:

"If the jury believe from the evidence that from July, 1861 to July, 1867 the Opelika & Oxford R.R. Co. had no means of building a railroad and had not had a corporate meeting either of directors or stockholders, and had no means or expectation of building the road which the company was authorized by its charter to build or any part thereof, and had abandoned the idea of so doing, that then there was no such title to the right of way remaining in that company as would be liable or subject to sale under execution, or which plaintiff could acquire by execution, sale, and sheriff's deed."

XIV.

In refusing to give the charge marked X. as requested by defendant as follows:

"If the jury believe from the evidence that Visscher knew that it was the intention of the Eufaula, Opelika, Oxford & Guntersville R.R. Co. to procure the aid of the State of Alabama in the construction of the Eufaula, Opelika, Oxford & Guntersville R.R., under the act of the General Assemby of Alabama, entitled, "An Act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads within the State, approved 21st February, 1870," and he, Visscher, went for-

ward and constructed and built said railroad with the knowledge of said purpose and intention on the part of said company, and that said company or the East Alabama & Cincinnati R.R. Co. (to which name and company said Eufaula, Opelika, Oxford & Guntersville R.R. Co. was changed) did procure the aid and credit of said State of Alabama for the construction of said road under said act of the General Assembly above-named by the endorsement by said State of Alabama of the first mortgage bonds of said company, and that the bondholders holding the first mortgage bonds of said company became parties to the foreclosure suit instituted by W. H. Barnes & Henry Clews, as trustees under the trust deed executed to them as such trustees by said R.R. Co. for the foreclosure of said trust deed against James J. Colt, *et al.*, in the Chancery Court of Lee County, Alabama, and that said holders of said endorsed bonds of said company were by the decree of said Chancery Court subrogated to the lien of the said State of Alabama, acquired by said endorsement under said act and said road and right of way and roadbed were sold by the Register of said Court under the decree of said Court, and said property, roadbed and right of way were purchased by E. Livingston and Richard Irvin, Jr., and the same was by deed of said Register conveyed to them, and that these defendants hold by purchase or otherwise by deed from said Livingston and Irvin, then they are protected by the said deed and superior lien of the State of Alabama, and hold under the same, and that they have a title superior to the title of Visscher, and that the plaintiff cannot recover in this case and the jury must find for the defendants."

STATEMENT OF POINTS AND ARGUMENT.

I.—The first assignment of errors is valid, because:

A. The executions under which the Sheriff sold were not supported by any judgment. The execution in favor of D. W. & J. G. Visscher was on a judgment for $14,457.21, while the only judgment in their favor was for $12,383.83, and the execution in favor of Lockett was on a judgment for $12,383.83, while the only judgment shown in his favor was for $14,457.21, and as the execution is only valid when a judgment is shown to support it, the transcripts were all irrelevant.

That such a description of a judgment is fatally variant, see

Ashley's Admr. v. *Robinson*, 29 *Ala. R.*, 122.

See also,

Shorter v. *Mims*, 18 *Ala.*, 655.

Where a judgment was issued for debt and interest, and the judgment was only for the debt, the execution was held to be defective, and the purchaser's title at the Sheriff's sale was held to be bad.

Collais v. *McLeod*, 8 *Iredell L.*, 221.

It seems to be a general rule that an execution must *exactly* follow the judgment and be warranted by it.

Reese v. *Burt*, 39 *Geo.*, 565.

Highton v. *Handlin*, 27 *Ark.*, 20.

Also, 29 *Iowa*, 176; 8 *Yerger*, 85; 72 *Penna.*, 11, 104; 29 *Mo.*, 293; 32 *Barb.*, 277; 10 *Bush*, 362; 7 *Conn.*, 6; 18 *Barb.*, 269.

B. The executions, together with the Sheriff's deed, only purported to levy upon, and sell and convey an easement or right of way, not the subject of ejectment.

A railroad is a public highway.

Olcott v. *Supervisors*, 16 *Wall*, 694.
2 *Washburn Real Prop.*, 291.
Lake Superior, &c., *R.R.*, v. *United States*, 3 *Otto*, 442.
2 *Redfield*, *Railways*, *4th ed.*, 248, 545, 491–2, *note*.
12 *American Decisions*, 295.

Nothing is shown to have been sold or owned but an easement or right of way.

1 *Redfield*, *Railways*, *4th ed.*, 246–7, 250; 42 *Alabama*, 91; *Williams* v. *W. U.*, 50 *Wisconsin*, 71.

"Turnpike roads, plank-roads and *railroads*, like ordinary highways, are *simple easements*," the fee remaining in the owner of the soil.

Thompson on Highways, 35.
Washburn on Easements, *3d ed.*, *Ch.* 2, *p.* 228.

The incidents, such as rails, &c., are not fixtures, but become personal property on abandonment or forfeiture of the easement or franchise.

Wagner v. *Cleveland & T. R.R. Co.*, 10 *Am. R.*, 270; 18 *Am. Law R.*, 709; 12 *Am. Dec.*, 295. In 2 *Wash. R. Prop.*, 272, it is said: "In no case can an in corporeal hereditament become a corporeal one; it is n a tenement nor is it land."

Ejectment will not lie.

Washburn on Easements, &c., 9–629–395–
693–30, *Am. Dec.*, 212; 12 *Am. Dec.*, 295
Waits, *Actions and Defenses*, 747, 746;
Am. Law Reg., 455; 24 *Cal. R.*, 474.

Doe dem Palmer v. Henderson, 1 Gale, 44

C. Ejectment will not lie, because the Visschers acquired no title to the right of way by the Sheriff's deed.

The plaintiff below must stand on the strength of his own title.

If we are correct in designating the right of way (which is all that is really conveyed by the deed of Killam, Sheriff) an easement—and if, as the authorities indicate, it is a "simple easement" in the land over which the road is constructed, then it must fall in the category of recognized easements and have the status, conditions and legal relations of one of the two kinds of easements known to the law.

It must be either an easement appurtenant to land or an easement in gross. It is not an easement appurtenent to land—if it were, the plaintiff below took nothing under the deed, for it is elementary that there must be both a dominent and servient estate to support such an easement. (*Dark* v. *Johnston*, 55 *Penna St.*, 164.)

The right of way in the case at bar was an easement in gross—that is a specific privilege not attached to an estate in land. It was a particular, and, so to speak, personal right in the Opelika & Oxford R.R. Co. Such a right was not assignable, and being, so to speak, personal, existed in the railroad corporation alone, and could not be separated from the railroad corporation. *Garrison* vs. *Rudd*, 19 *Ill.*, 564, as to the personal character of the easement. *Washburn on Easements*, *3d Ed.*, *p.* 232, and cases cited.

The form of the deeds of the right of way (*e. g.*, McLemore deed) does not alter the rule of law. Those deeds ran to the railroad company, "their successors and assigns." The word "assigns" should probably be limited in construction to the "assigns" of the whole corporate franchise and property, but if it be otherwise, and the word "assigns" be held to mean transferees of the particular right of way, mentioned in each deed

as a separate subject of sale and conveyance, the rule remains the same.

"A man may have a way in gross over another's land, but it must *from its nature* be a personal right, not assignable nor inheritable; nor *can it be made so by any terms in the grant* any more than a collateral and independent covenant can be made to run with the grant," &c.

Washburn on Easements, *p.* 10, § 11.

Any other construction would allow the conversion of the public highway into a mere private road. If an individual can become the grantee or assignee of a right of way to a public highway, he can turn a public road into a private road; but a private person cannot acquire the ownership of right of way in a public highway.

State v. *Jefcoat*, 12 *Rich.* (*Law*), 529.

A purchaser under foreclosure decree would stand on a different footing—for he becomes the owner of the franchise, and all of the property of the road, and the right to mortgage the right of way is given either by the express terms of the Charter, or by provision of Statute.

The use of the word "assigns" in the deed does not render the privilege any the less personal, because that word must be taken to mean those persons who could by law be the assigns of the corporation. The Charter of the La Fayette Branch Railroad Company gave the company the power to sell, lease and convey real, personal and mixed property so far as should be necessary for the purposes of the corporation. It could not, therefore, alien its rights of way.

D. The description in the levy and deed are so vague as to make the whole proceeding a nullity. A right of way is all that is sold or conveyed, without other limit in length than from La Fayette to the line of

Lee County, and with none laterally, and limited by a statement that it is only "so far as the right *a* way has been obtained. If there is any rule that a grant shall be described, so as to be recognized, this deed was fatally defective.

II.—The Court erred, as shown in the second assignment of error, because the evidence offered by defendant and excluded by the Court was relevant to show the judgment of a Court of competent jurisdiction on the very claim in question against the defendant in error.

He had filed a petition in the Circuit Court of the United States setting up this identical claim.

Judge Busteed, sitting in that Court, undertook to review his own decision in the Bankrupt Court, and dismissed the petition. Mr. Justice Bradley, at the same term, set aside his order and continued the cause for the term, but afterwards and during the term Judge Busteed set aside Mr. Justice Bradley's order and reinstated his own order sustaining a demurrer to the petition and dismissing it. This may have been irregular, but it was not void, and could only be corrected by appeal.

III. and IV.—The assignments of error III. and IV. on exceptions to the charges Nos. 1 and 3, are good for the reasons and on the authorities cited in considering the first assignment of errors, for they assume that the description of the property in the Sheriff's deed is sufficient, and that a recovery can be had of an easement in an action of ejectment.

The exceptions are good also because, supposing the facts assumed to be true, it appears that plaintiff below had only a right to enforce his contract in equity. If he let the East Alabama & C. R.R. Co—under its original name—into possession under the contract with

Pennington, Prest., in evidence, then he could only enforce payment of the amount he stipulated for, and not bring ejectment.

See *Mills on Eminent Domain*, § 140, *note*.
Provalt v. *Chicago R.R. Co.*, 57 *Mo.*, 256.
Smart v. *Portsmouth R.R. Co.*, 20 *N. H.*, 233.
Macaulay v. *Western R.R. Co.*, 33 *Vt.*, 311.
Jones v. *S. & N. O. R.R. Co.*, 68 *Ala.*, 48.

V.—The fifth assignment of error is in the charge No. 4, that if plaintiff recovers he is to recover "all the property sued for as described in the complaint" (Tr., p. 20).

The bill of exceptions states all the evidence. The complaint claims 75 feet of land on each side of the centre of the roadbed (See Tr., p. 1).

The deed of McLemore (and all the others are like it) conceded only a right of way of 50 feet on each side of the slope stake of the right of way of said road when completed (Tr., p. 30).

Neither the Sheriff's deed nor the contract entered into with Vischer, nor the deed of McLemore, nor any part of the evidence gives color to a claim of 75 feet on each side of the railroad of the East Alabama & Cincinnati R.R. Co.

The defendant (plff. in error) is in possession of the land described in the complaint. The consent rule makes him admit this and it is incumbent on the plaintiff below to show title and the right of possession, and he could recover only to the extent that he did show it

VI, VII, VIII and IX.—The assignments of e VI., VII., VIII. and IX. have been considered u the propositions on the 1st assignment.

X.—This assignment of error relates to the charge G (Tr., p. 21) asked by the plaintiff below and given at his request.

This charge assumes that there was evidence under which the plaintiff might recover the whole property described in the complaint. This we have shown not to be so in the proposition argued in the V. assignment of error.

XI, XIII and XV.—These assignments of error are in the charges I, V and Y, and all relate to the refusal of the Court to charge that an abandonment by a railroad company of the project of building a railroad for a number of years causes the right of way secured by it for the purposes only of constructing a railroad, to revert to the owners of the soil by whom such rights of way were so granted (For the charges see Tr., pp. 22, 23, 24).

Meyer v. *Johnston*, 53 *Ala.*, 240, 12*th head note.*

XII.—The assignment of error XII. relates to the refusal of the Court below to charge No. II., as requested by the defendant below (Tr. p. 22).

The considerations attaching to it have already been presented in this brief concerning the requirements of the plaintiff below, to assert whatever remedy he had in equity.

XIV.—The XIV. assignment of error arises under the charge X., which the defendant below asked the Court to make and which the Court refused to make.

It appears from the documentary evidence, to wit: the bill in equity introduced by the plaintiff below in evidence on the trial, that all and each of the facts recited in this charge and which were sought to be sub-

mitted to the jury actually existed, except the knowledge of Visscher of the purpose and intention with which the contract with him to build the road was made by the E. O. O. & G. R.R., and that knowledge of the purpose and intent appears from his own evidence (Tr., p. 17).

The facts recited in this request to charge show him *to be estopped* from asserting a title against these who hold under the mortgage sale, he having surrendered the possession to the railroad company and done work on the property for it with a view to the corporation executing the very mortgage under which the State of Alabama acquired a first and superior lien to the very property and right of way in question, to which lien the holders of first mortgage bonds endorsed by the State became subrogated, to secure which lien the mortgage was made, and under the foreclosure of which mortgage and the sale under the foreclosure the defendants claim and are in possession of the *locus in quo*.

Estoppel *in pais* is available at common law as well as in equity.

2 *Pars. Cont.*, 801.

Bigelow on Estoppel, 431–35.

Barnard v. *Germ. Am. Semi.*, 49 *Mich.*, 444.

Shannon vs Burrell 4 Irish L.R. 223; in action of ejectment.

"The principles on which the doctrine of estoppel *in pais* is based are simply rules of evidence by which, in consequence of certain matters having taken place, a party is precluded from proving certain other facts or relying on a certain claim or defense which he otherwise would be entitled to prove or rely on. These rules are the same in actions at law and suits in equity."

Bean v. *Pettingill*, 7 *Robt.*, 11.

Such an estoppel cannot in the nature of things be pleaded in a common law action of ejectment where the special matter *in pais* must come in as evidence, for the proper plea is "not guilty."

A party "cannot be said to have an opportun
plead an estoppel and voluntarily to omit to do so
the previous pleadings are such that if he did ple
it would be demurrable."

Phil. W. B. & R.R. Co. v. *Howard*, 13
U. S., 334.

It need not be pleaded
Freeman v. Cooke 6 Dowling & Lown

In *Welland Canal Co.* v. *Hathaway*, 8 *Wend.*
Nelson, *J.*, speaking of estoppels, *in pais*, says: "
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In the case at bar, Visscher is estopped from se
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The plaintiff in error stands in this attitude:
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The facts recited in this request to charge show him *to be estopped* from asserting a title against these who hold under the mortgage sale, he having surrendered the possession to the railroad company and done work on the property for it with a view to the corporation executing the very mortgage under which the State of Alabama acquired a first and superior lien to the very property and right of way in question, to which lien the holders of first mortgage bonds endorsed by the State became subrogated, to secure which lien the mortgage was made, and under the foreclosure of which mortgage and the sale under the foreclosure the defendants claim and are in possession of the *locus in quo*.

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A party "cannot be said to have an opportunity to plead an estoppel and voluntarily to omit to do so when the previous pleadings are such that if he did plead it, it would be demurrable."

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It need not be pleaded Treamer v. Cooke & Dowling Rounds, 18 7.

In *Welland Canal Co.* v. *Hathaway*, 8 *Wend.*, 482, Nelson, *J.*, speaking of estoppels, *in pais*, says: "Such estoppels cannot be pleaded, but are given in evidence to the Court and jury, and *may operate as effectually as a technical estoppel, under the direction of the Court.*"

In the case at bar, Visscher is estopped from setting up his title to the right of way (even if he acquired any), because he did the work to complete the twenty miles of road with knowledge of and to give effect to the intent of the Eufaula, Opelika, Oxford & Guntersville R.R. Co. to procure the endorsement of the State of Alabama of bonds of the R.R. Co., by which endorsement the State would acquire a first lien on the road, and to which lien the holders of the endorsed bonds would become subrogated.

The plaintiff in error stands in this attitude: It is the purchaser of the railroad under a decree of foreclosure of a mortgage made by the East Alabama & Cincinnati R.R. Co. That mortgage was given to secure certain bonds, some of which were endorsed by the State of Alabama—by its endorsement the State acquired *ipso facto* a lien on the road—the holders of those bonds were subrogated to the rights of the State, the State's lien attached, the mortgage was foreclosed, and the road sold to pay in part and preferentially the holders of the endorsed bonds. Visscher stood by and knew and aided the purpose of giving the State the

lien. He could not, therefore, set up his title against the State.

Swain v. *Seamens*, 9 *Wall.*, 254.
Bank of U. S. v. *Lee*, 13 *Peters*, 107.
Erwin v. *Lourey*, 7 *How., U. S.*, 172.

This rule of estoppel applies to real property.

Shapley v. *Rangeley*, 1 *W. & M.*, 213.
Trenton Banking Co. v. *Duncan*, 86 *N. Y.*, 228, *citing Wendell* v. *Van Rennsaler; Hungerford* v. *Earle; Storrs* v. *Baker.*

If Visscher could not set up his title against the State seeking to enforce its lien, he cannot set it up adversely to those claiming under the State's lien by subrogation to the rights and remedies of the State of Alabama, acquired by the endorsement of the bonds. The holders of that lien are for all purposes of its enforcement the State.

The history of the lien, its nature and effect, are matters of public record and public law in the State of Alabama.

By act of the Legislature of Alabama—a public act of which the Court takes judicial notice—approved Feby. 21st, 1870 (Pamphlet, Acts of 1869–70 Alabama, pp. 149–57), provision was made for furnishing the aid and credit of the State for the purpose of expediting the construction of railroads within the State. This aid was to be furnished by the State endorsing the bonds secured by mortgage, of the railroads to whom the assistance was to be furnished under the act, and this aid was to be given under fixed conditions, to the extent of $16,000 per mile, when twenty miles of continuous road at or near either terminus, &c., should be "finished, equipped and completed." The endorsement of the bonds by the State constituted *ipso facto* a first line on "the section or sections of said road so far as completed, including roadbed, superstructure and equip-

ment and the franchise of the company granted by the State or under its authority" (§ 3, Act Feby. 21, 1870).

The defendant in error made his contract Ex. F. with Pennington, Presdt., in order that the State's endorsement might be obtained upon bonds issued on the completion of the twenty miles through Chambers County. The very purpose of his contract he knew to be that, and he knew that if the endorsement were given, the State's lien would attach. The act was passed Feby. 21, 1870. The contract Ex. F. is dated March 15, 1870, and its formal execution was on April 6, 1870. The act was a public and not a private act (§ 10 of said act).

The right of the State of Alabama as against Visscher, to insist that he is estopped from claiming against it, seems to be clear. It is submitted that it is equally so against the plaintiff in error.

The plaintiff in error was subrogated to the lien of the State and to its rights. This has been expressly decided by the Supreme Court of Alabama as to the very endorsed bonds in question.

Colt v. *Barnes*, 64 *Ala.*, 108.

The statutory lien which the State had inured to the benefit of the holders of the endorsed bonds, the mortgage was foreclosed, the road and its franchises, incidents and property sold to pay the bonds, and on final decree the endorsed bondholders were paid first. The plaintiffs in error are a corporation succeeding in ownership the purchasers at the foreclosure sale.

EDWARD PATTERSON,
HENRY C. SEMPLE.
For the E. A. Ry. Co., Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1884—No. 207.

THE EAST ALABAMA RAILWAY COMPANY, *Plaintiff in Error,*

versus

JOHN DOE, EX DEM., DANIEL W. VISSCHER, KATY LOU VISSCHER, ANNA DAN. VISSCHER, GEORGE GLEN VISSCHER, HENRY BECHMAN VISSCHER, A. S. WOODWARD AND ABNER M. LOCKETT, *Defendants in Error*

In Error to the United States Circuit Court for the Middle District of Alabama.

BRIEF OF SAMUEL F. RICE, FOR DEFENDANTS IN ERROR.

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BRIEF OF SAMUEL F. RICE, FOR DEFENDANTS IN ERROR.

It is submitted that the exceptions were not so taken in the court below as to entitle the plaintiff in error to a revision in this court of the rulings of the court below.

No. 4 of the Rules of the Supreme Court.
Beaver vs. Taylor, 93 U. S. Rep., 46.
Lincoln vs. Claflin, 7 Wall., 132.
1 Black, 220; 1 Wall., 644.
2 Wall., 328.
111 U. S. R. 585–597.

In Beaver vs. Taylor, *supra*, this court said: "One object of an exception, is to call the attention of the circuit

judge to the precise point as to which it is supposed he has erred, that he may then and there consider it and give new and different instructions to the jury, if in his judgment it should be proper to do so." That object would be defeated, by sanctioning such exceptions as are here presented for the consideration of this court.

The charge given by the court below, covered the entire case and submitted it properly to the jury; and therefore, according to the settled law in this court, the court below was justified in refusing to give any further instructions.

Indianapolis and St. Louis R. R. Co. vs. Horet, 93 U. S. Reps., 291.

"When it plainly appears on the face of a record, that the judgment below was right, it will not be reversed for a technical error which worked no injury to the plaintiff in error."

Mobile & Montgomery R. R. Co. v. Jurey, 111 U. S. R. 585.

But even if all the matters here complained of by the plaintiff in error, were so presented as to be broadly examinable, there is no reversible error in any of them.

The action is in common law form of ejectment. The defendant entered into the consent rule admitting lease entry and ouster, and pleaded "not guilty." It will be noted there were no exceptions interposed to the complaint for insufficiency, nor were there any special pleas.

The plaintiff, Visscher, relied, first, upon a paper title; and secondly, upon the proposition that the defendant below is a derivative purchaser from the E. O. O. & G. R. R Co.; that said last named corporation purchased the property from the plaintiff, while the latter was in possession, claiming to own it, and was let into possession by plaintiff; and hence, that the defendant is estopped from denying the plaintiff's title, in the absence of any restoration of the possession to the plaintiff.

Houston v. Farris, *et al.*, 71 Ala. R. 570.

Smith v. Mundy, 18 Ala. R. 182.

Camp v. Camp, and note thereto, 13 American Decisions, 60 to 70.

Bishop v. Lalouette, 67 Ala. R. 197, in which Camp v. Camp is cited approvingly.

Bigelow on Estoppel, 370.

Herman's Law of Estoppel, § 380, p. 388.

I.

As to the paper title.

(a.) The property was originally acquired by the O. & O. R. R. Co. from the owners of the soil by deeds in all respects like that from Mary F. McLemore. (Trans., p. 30). Visschers and one Lockett, became contractors for that company. It failed and they sued it, and in 1866 obtained judgments in the Circuit Court of Chambers county, Ala.,—the Visschers for $12,383.83, and Lockett for $14,457.21. (Trans., pp. 32, 36). Executions were issued on these judgments and levied on the right of way to the Opelika and Oxford Railroad. In the case of Lockett the sheriff (Kellam) described the property as "the right of way of the Opelika and Oxford Railroad, so far as the right of way has been obtained," &c. (Trans., p. 34). The levy in the case of Visschers was endorsed in these terms: "and also the right of way to the Opelika and Oxford Railroad, so far as the edge of Lee county." (Trans., p. 38).

In pursuance of these levies, the property was sold by the sheriff, purchased by the Visschers and one Woodward, and a deed executed to the purchasers. Trans., p. 40.

Thus, (jointly with Woodward), the Visschers became invested with the legal title.

The plaintiffs, as proof of this title, offered three transcripts in evidence. The first, showing judgment, in favor of D. W. and J. G. Visscher, issuance of execution, and levy by the Sheriff of Chambers county upon the property sued for. (Exhibit "C" to bill). Second, judgment in favor of Lockett, issuance of execution, and levy by Sheriff of

Chambers county on same property. (Exhibit "D" to bill). The third deed of Kellam, Sheriff, to the property sued for, to D. W. & J. G. Visscher and Woodward.

Transcripts "C" and "D" also showed certain proceedings in another county, but were not objected to upon that ground.

Each transcript was objected to as a whole on three grounds: First, that they were illegal; second, and because they were irrelevant, and third, because they tended to show the sale, &c. The point that the deed was indefinite, which the plaintiff in error attempts to raise in his brief, (p. 22), was not made in the court below, nor was either transcript objected to on the other ground now urged in the first assignment of error; that is to say, a discrepancy in the amount of each judgment and of the executions thereon. Such objection must be special, and cannot be raised on a mere suggestion that the evidence is illegal and irrelevant.

Johnson v. McGehee & Thomas, 1 Ala. 186.

Where the objection is on specified grounds, it is a waiver of all other grounds.

35 Ala. 328.
9 ib., 959.
17 ib., 810.
27 ib., 687.
28 ib., 601.

(b.) But had the objection been properly made, the court would not have erred in overruling it. We take issue with counsel for the plaintiff in error in their statement (brief, p. 19), "it seems to be a general rule that an execution must *exactly* follow the judgment, and be warranted by it." Such is not the rule when the execution is collaterally assailed. It devolves then upon the third party to show that it was a nullity; and until this is shown no rights or titles acquired by the parties to the judgment or execution, or purchaser under it can be affected.

Brown, Toler & Phillips vs. Hurt & Bro., 31 Ala. 146.

In the case cited it is said "it is a sound rule that such execution, being voidable only and not void, is, *until set aside* or *avoided*, as effectual to protect the plaintiff, the officer and the purchaser, as if it were free from error or objection." In the same case (again adverting to the distinction between *void* and *voidable* executions, and referring to the case of Harris vs. West, 25 Miss. 156, in which the Alabama Court says that such distinction was not properly observed) it is said: "It is true the Court in that case say the execution was void. But still the Court treated it as voidable only, by quashing it on motion; and we all know that Courts in their language often fail to keep up the distinction between void and voidable process, when, as in the case of Harris vs. West, the distinction was not material upon the facts before the Court."

See also Cogburn v. Spence, 15 Ala. 549.

Blount v. Taylor, 4 Ala. 668.

Fournier v. Curry, 4 Ala. 321.

Jackson v. Bartlett, 8 Johns. 361.

Read v. Markle, 3 John., 523.

Woodcock v. Bennett, 1 Cowan, 427.

Wherever the judgment is sufficiently identified by the execution, irregularities in the latter do not affect the title of the purchaser. This seems to be the only requirement, and it is not claimed there is any discrepancy between the judgments and executions in the case at bar, except a simple mistake as to amounts.

See Herman on Executions, p. 516.

By the settled law in Alabama, the executions shown in this case, were clearly amendable; and when *collaterally assailed*, they must be treated as amended, and as sufficient to sustain the title of the purchaser at the sheriff's sale.

McCullum v. Herbert, 13 Ala. R. 282.

Thompson v. Bondurant & King, 15 Ala. R. 346.

Brickell Dig. p. 891, § 9.

It may be stated as the settled rule in Alabama that "a sheriff's deed is conclusive and cannot be impeached on a

collateral issue except for fraud in its execution, whenever the process under which the land is sold is supported by an existing, operative and unsatisfied judgment."

Love & Williams v. Powell, 5 Ala. 58.

Ware v. Bradford, 2 Ala. 676.

Smith v. Houston, 16 Ala. 111.

Pollard v. Cocke, 19 Ala. 188.

Driver v. Spence, 1 Ala. 540.

In the case last cited it is said that it is not a valid objection to the admission in evidence of the sheriff's deed, that it does not correspond with the levy endorsed on the execution. See 2d Brickell's Alabama Digest, p. 458, § 377 *et seq.*

The land being situated in Alabama, the *lex rei sitae* must be controlling in this suit.

(c.) The third and last ground of objection to the transcripts, to-wit: "Because they tended to show the sale under execution * * * of an easement, alone not the subject of an *ejectment*," is, we submit, unintelligible, and was properly overruled, on that ground, if no other. It was probably intended to assert, as is elsewhere done in the charges requested, that the O. & O. R. R. Co. had only an easement in the property levied upon, and that it could not therefore be sold under execution. So treating it, and examining the bill of exceptions (which purports to set out all the evidence), we find that the defendant in execution acquired its title from the owners of the soil to all its roadbed and right of way (with one exception, which will be noticed), by deeds similar in all respects to that from Mary F. McLemore to the company. Trans., p. 30 and p. 14, fol. 38.

That deed conveys the "right of way" "with all and singular the rights, members and appurtenances to the said strip, tract or parcel of land being, belonging, or in any wise appertaining, and more especially the right of way over the same, *to have and to hold the same* unto the said Opelika and

Oxford R. R. Company, *their successors and assigns* to their own proper use, benefit and behoof, *in fee simple forever.*" Up to this point, there can be no doubt that the deed carried the fee. Is it affected by the limitation coming afterwards: "that should the said railroad contemplated as aforesaid be not located and established on and along said strip * * of land * * the said indenture is to be wholly null and void?"

1st. We suggest that no time is fixed by the condition within which the work was to be done.

2d. That as the deed is to the O. & O. R. R. Co., its "successors and assigns" the possible failure of the company was provided against, and the right continued to others.

3d. That a purchaser at sheriff's sale would be "an assignee" within the meaning of the deed.

4th. That the covenants of warranty to the company, "its successors and assigns" show the grant was to continue to others than the particular company.

5th. That until default claimed, the grant continues. The evidence fails to show any default claimed.

6th. That Mrs. McLemore is the only person who could insist on the default.

Shulenberg vs. Harriman, 21 Wall., 44.

7th. That the default could not be claimed after the road had been built.

Rice vs. B. & W. R. R. Co., 12 Allen (Mass.) 141.

8th. That the defendant being in possession under the Visschers cannot be heard to say that a right to claim a forfeiture exists in Mrs. McLemore.

The deed, for these reasons, did not, we submit, convey an easement, but conveyed the property itself.

(d.) But had it conveyed simply "a right of way" for operating a railroad, the interest conveyed would still be liable to sale under execution.

State v. Rives, 5 Ire., 297.

Bank v. Edgarton, 30 Ver., 182.

Arthur v. C. R. R., 9 S. & M., 394.

Cone v. Company, 5 Cush., 509.

Shirley v. Waco R. R., 45 Texas, 355.

Especially is this so, in view of the statute in Alabama, which provides that executions may be levied "on real property to which the defendant has a legal title * * * or in which he has a *vested legal interest*," &c.

Code of Alabama (1876), § 3209.

That an easement in land can be created only by deed, and is a "legal estate."

See 2 Wash. Real Prop., p. 301.

(c.) If the title to the property was conveyed by the Sheriff's deed, then the purchasers may maintain ejectment, even though some of the incidents of an easement may have attached originally to the company's right.

The precise question has lately been determined by the Supreme Court of Alabama in Coosa and Tennessee R. R. Co. v. The East Alabama Railway Co. (MSS.), after an exhaustive review of the authorities. In that case it is said: "It is objected in the next place that plaintiff has not sufficient property in the realty to maintain ejectment; that plaintiff has only an easement and no title to the soil; and that ejectment will not lie for the recovery of an easement. It is true that ejectment will not lie, as a general rule, for an easement or to be let into the use or occupation of a servitude. The reason is, that the party complaining has only a right in common with the public, or with some other person or persons to the use or occupation claimed. The right is a qualified limited one, and in ordinary cases is not disturbed by another's similar occupation. It is but a privilege to go on the lands of another for a specified, limited purpose, and has no element of exclusiveness in it. A right of way or of common may be given as illustrations of this privilege."

The Court refers to the following authorities:

Washburn on Easement, 3d ed., §§ 260, 270.

Child v. Chappell, 9 N. Y., 246.

Morgan v. Boyes, 65 Me., 124.

Rees vs. Loveles, 12 Am. Decis., 295.

It then proceeds to say: "There are cases which go beyond this doctrine," and cites:

Wood v. Truckee Turnpike Co., 24 Cal., 474.

Union Canal Co. v. Young, 30 Am. Decis., 212.

2d Wait's Act. and Defences, 774.

2d Redf. Rlwys., 553.

The Court, further discussing the question, says that "lands claimed and condemned as a road-bed and right of way of a railroad, stand in a different category of ordinary easements. Over them is acquired not the right of use to be enjoyed in common with the public or with other persons. The right and use are exclusive and no one else has any right of way thereon."

M. & O. R. R. Co. v. Williams, 53 Ala. 595.

M. & M. R. R. Co. v. Blakely, 59 Ala. 472.

Tarver v. L. & N. R. R., 60 Ala. 621.

Cook v. Cen. R. R. & B'king Co., 67 Ala. 533.

R. & G. R. R. Co. v. Davis, 2d Dev. & Bat. Law, 451.

Jackson & B. R. R. Co. v. Parter, 42 Ver., 265.

"Ejectment was originally classed as a possessory action. Hence it was that at common law any number of actions could be maintained by laying demise at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession in form legal, as distinguished from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterwards found in possession, unless the latter can show a paramount title, or a possession continuous, peaceable and adverse, of sufficient duration to toll entry."

Tyler on Eject., 70.

Anderson v. McLean, 56 Ala. 621.

"A lessee or termer, during the continuance of a valid lease, may maintain the action against the lessor, although the owner of the entire fee, less the term. So the title of a

railroad corporation to the possession of the soil covered by the road-bed and right of way, will, after condemnation, dominate all adverse claim of possession, even by the owner of the fee. Although the right which a railroad acquires to land taken under charter, is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety require that the possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used."

32 Verm., 43.

"One who has the exclusive right to mine coal upon a tract of land, has the right of possession, as against the owner of the soil, so far as it is necessary to carry on his mining operations."

Yuran v. Reynolds, 23 Penn. St. 199, 216.

"The right of municipal corporations or public authorities vested with no higher estate than a public easement or right by dedication to make the remedy of ejectment for the possession of streets, public squares, town commons, church and market grounds, is upheld in many cases."

Sedg. and Wait, Trial of Title to Land, § 271.

Jackson v. Saxton, 16 Johns, 184.

Winona v. Huff, 11 Min. 119.

Cincinnati v. White, 6 Peters, 431.

Dummer v. Jersey City, 40 Am. Dec., 213.

Hoboken Land Co. v. Mayor, 36 N. J. Law, 540.

Doe, ex dem., v. Booth, 2 Bos. & P., 219.

3 Wait Ac. & Def., 6, 7.

"In the following cases will be found a curious discussion, tending strongly to show that the road-bed and superstructure—in fact everything attached to the soil on which a railroad is built—are considered realty: Randall vs. Ellwell, 52 N. Y. 521; S. C. 11 Amer. Reports, 747; Hogle vs. P. & M. R. R. Co., 54 N. Y. 384; S. C. 13 Amer. Rep. 595; and there is certainly much reason for the opinion: The road-bed and right of way are as immovable as the soil itself;

the superstructure is attached to the soil, and the corporation has the exclusive right to the possession of it. In Central Pacific R. R. Co. vs. Benity, 5th Sawyer, 118, the precise question we are considering was presented, and the Court, Circuit Justice Sawyer, participating, decided the action of ejectment would lie. So we hold it will be in this case."

It may here be remarked that since this cause has been pending in this Court, the Supreme Court of Alabama, in Hooper vs. S. & M. R. R. Co. (MSS.), expressly disaffirmed the doctrine that ejectment cannot be maintained under the circumstances referred to in the brief of the plaintiff in error; (III and IV, pp. 23, 24), and declare that the expressions in Jones vs. S. & N. O. R. R. Co., 68 Ala. 48, are *dicta*.

II.—As to Estoppel.

But the defendant below is estopped from denying that the Visschers were seized in fee of the property. The Opelika and Oxford R. R. Co., through its president, had abandoned the property and turned it over to the Visschers and made no claim to it. (Trans. p. 17, folio 47). Afterwards, as the evidence discloses without controversy, the E. O. O. & G. R. R. Co. purchased the property from the Visschers and were let into possession by them.

D. W. Visscher so testifies. (Trans., p. 16, folios 43 and 44). Hardaway, the defendant's witness, deposes to the same fact. (Trans., p. 68, folios 196-198).

In the concluding part of the contract between the Visschers and the E. O. O. & G. R. R. Co., made at the time of the sale and afterwards reduced to writing, by which the former agreed to complete the first twenty miles of the road, it was provided, that "upon the completion of the first twenty (20) miles and the payment of the amount of said contract, the said D. W. Visscher shall transfer to said company all right and title vested in him to all franchises, right of way, or other property belonging to or pertaining to the said road under the organization known as the Opelika and

of competent jurisdiction on the very claim in question.

Discarding the question presented by the authorities whether an estoppel can be proven without being specially pleaded, (Bigelow on Estoppel, pp. 519–21), there were many reasons why the evidence should have been rejected.

(a.) No parties were made to Visschers' petition, ~~The only reason for here to make parties~~, save the Assignee in bankruptcy.

Walker v. Carroll, 65 Ala. 65.

(b.) The District Judge was incompetent to determine the case.

U. S. Rev. Stat., §§ 614, 4986.

The record discloses that a distinct objection was made to his exercise of jurisdiction.

Trans., p. 76.

Bigelow on Estoppel, p. 11.

(c.) The judgment was not rendered upon the merits. "There are three elements universally necessary to constitute an estoppel by judgment: (1) the judgment must have been valid, that is not void; (2) it must have been rendered on the merits; (3) it must have been final."

The judgment here does not purport to have been rendered upon the merits, but upon demurrer, the grounds of which are not shown.

A judgment upon demurrer is not conclusive so as to be pleaded to another controversy involving the same matter unless the demurrer goes to the merits.

Bigelow on Estoppel, pp. 22–25.

Griffin v. Seymore, 15 Iowa, 30.

And the burden of showing it was so rendered rests on the party asserting the estoppel. Authorities, *supra*.

(d.) Neither the defendant nor any one through whom it claimed, assert any title or right under the alleged judgment, nor connect themselves in any way with it.

(e.) Estoppels must be mutual.

Clearly the judgment could not be set up by Visschers against the plaintiff in error. Neither, therefore, can it be set up by plaintiff in error against Visschers.

Harrison v. Plant & Co., 31 Ala. 644; and authorities there cited.

It will be noted that no title is asserted by the defendant, immediate or derivative, under any sale in bankruptcy. Indeed the bill of exceptions shows (Trans., p. 19, folio 53) that the defendant "stated in open court that it did not claim title under the sale in bankruptcy." Only an estoppel by judgment is set up.

IV.

The fifth assignment presents a question already referred to—the measure of recovery as between fifty and seventy-five feet from the center of the track. We submit that the question here attempted to be presented was not brought distinctly to the attention of the court below. The charge of the court criticised was evidently intended as a mere formal instruction to the jury as to the *form of their verdict*, and was not intended to instruct them in relation to the *quantum* of recovery.

In order to be reviewed here, it should appear that the objection urged was specificially raised in the court below. It was the purpose of Rule 4 of Practice to secure this protection to the lower court and to suitors.

See authorities cited in support of the first proposition.

But we take issue with the plaintiff in error in the statement (Brief, p. 24), that "the contract entered into with Visscher * * * gives [no] color to a claim of seventy-five feet on each side of the railroad," &c. The contract between the company and the Visschers (Trans., p. 45), refers (folio 126) to certain plans and specifications "as hereunto appended," but which do not appear in fact to have been appended to that copy of the contract retained by Visschers. These specifications are, however, shown in Exhibit "A" to the affidavit of R. A. Hardaway. (Trans., p. 72). In the outset the specifications provide that "the ground set apart for the railroad is to be cleared to the

boundary lines of the company's land as the same shall be designated by the engineer. This will be in general, one hundred and fifty feet."

Besides, the defendant defended for the *whole* of the property sued for. The evidence discloses that it got all it claimed through the Visschers, and not otherwise. If defendant had claimed less than the whole, the statute of Alabama authorized it to state distinctly on the record, the extent of its possession.

Code of Alabama (1876), § 2963.

V.

The court properly refused to give the charges I, V and Y, requested by the defendant below.

(a.) Each of the charges were abstract, in that it was assumed the O. & O. R. R. Co. had acquired a mere right of way; whereas the evidence discloses that the deeds to it from the owners of the soil, carried the fee. This has already been discussed in subdivision (c) of the first proposition.

(b.) The charges were also abstract in assuming there was evidence that the company had abandoned the idea of building a railroad. Richards, the last president, testified (Trans., p. 15, folio 40), that as late as 1863 he had removed some obstructions; that "he hoped the company might some day be able to resume work, and that he looked after the work from time to time."

(c.) But had the company only such right in the soil as usually appertains to railroads, no "abandonment by [it] of the project of building a railroad," would operate a reversion to the owner of the soil, *as against creditors*. Certainly not as against creditors who had parted with their money in partially constructing a road on the soil itself.

Rice v. B. & W. R. R. Co., 12 Allen (Mass.) 141.

Wood's Field on Corp., § 451.

Creditors would be protected against an express repeal of the charter, had such right of repeal been reserved. Much

more will they be protected, where a forfeiture is attempted to be established in a collateral proceeding, and that, too, for a mere non-user.

VI.

Much stress is laid by plaintiff in error upon the last—XIV—assignment of error, in relation to an alleged estoppel *in pais* said to arise from the knowledge of Visscher that it was the intention of the company to procure the State's endorsement of its bonds.

Whatever may be the rule in those States where there is no separate equity jurisdiction, it is the settled rule in Alabama, that estoppels *in pais* cannot defeat a recovery on the legal title, *in a court of law*. "In such case, a court of equity alone is competent to afford relief."

McPherson v. Walters, 16 Ala. 714.

Smith v. Mundy, 18 ib. 182.

Walker's Heirs v. Murphey, 34 ib. 591.

But were such estoppels available, there is nothing in Visscher's conduct that would operate to estop him.

(a.) The only evidence of his knowledge of the intention of the company, and of his acts as related to the matter of endorsement, is found in his own testimony. He said "he was informed by Pennington that he expected to get the State's endorsement of the East Alabama and Cincinnati Railroad Company's bonds in respect of the twenty miles of railroad embraced in the contract with the Visschers, and that the said contract was entered into with a view of procuring the endorsement of the State of its bonds; but he also said that he had never consented to said endorsement, and did not intend to consent to it till the contract was complied with by the payment of the money to him under it."

The tenth charge asserted the proposition that if the bonds of the company were afterwards endorsed, the holders were subrogated to the lien of the State, and that such lien ripened into a title by virtue of the foreclosure suit. And that Visscher, because of his acts, as deposed to by him,

was estopped from setting up his title. The charge ignores the plainest principles of the doctrine of equitable estoppel as announced by this court.

In Brant vs. Virginia Coal and Iron Co. et al., 93 U. S., 326, it is said (p. 335), "For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud." The language of Justice Story is approvingly quoted, wherein he says, "there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." In Bigelow on Estoppel, p. 437, it is said "that the cases, when carefully analyzed, show that all the following elements must be present in order to an estoppel by conduct:

(1.) "There must have been a representation or concealment of *material* facts.

(2.) "The representation must have been made with *knowledge* of the facts.

(3.) "The party to whom it was made must have been ignorant of the matter.

(4.) "It must have been made with the *intention* that the other party should act upon it.

(5.) "The other party must have been *induced to act upon it.*"

The charge ignores each of these essentials.

(b.) Visscher's conduct and *status* was just what it might and should have been under the Act of the General Assembly authorizing the endorsement of the bonds of railroad companies. Pamphlet Acts, Ala. 1869–70, p. 149. By the terms of that act the company itself was to build from its own resources the first twenty miles of road before any endorsement could be had. The endorsement could not be anticipated; this much the company must have done before the right of requesting an endorsement could accrue.

In section 2 of this act, is the following proviso:

"That before any railroad company, embraced in this act shall receive any endorsement of the State upon its bonds,

the Governor shall require proof, by affidavit of the president and treasurer of said railroad company, that the first twenty miles thereof, were built from other resources of said company, independent of the State aid authorized by the provisions of this act; and that the amount required to build said twenty (20) miles, is not to be refunded in whole or in part, from the proceeds of bonds to be endorsed by the State; but that the means used in building said twenty (20) miles, have been derived *bona fide* from other resources of said company," &c.

Visscher knew it was the ultimate purpose of the company to procure the endorsement; but he relied, as he had a right to rely, upon the provisions of the statute, forbidding an endorsement until the road was paid for out of the resources of the company independent of the endorsement. This is the sum of his offending.

But this question, like many other questions in this case, has been determined by the Supreme Court of Alabama since the trial of this cause in the court below. In Tennessee and Coosa R. R. Co. vs. The East Alabama Railway Co. (in equity), reported in the 73 Ala., p. 426, a state of facts strongly similar to those now presented will be found. The very foreclosure proceedings and the title acquired under them here set up, were set up in that case. The doctrine that the State by the endorsement of the bonds acquired a first lien, and that the holders by subrogation acquired priority, was there claimed as it is here. So also was the doctrine of estoppel *in pais* invoked. The case at bar is stronger than that in this: the Coosa River R. R. Co. actually parted by deed with its possession of its property, but with a condition by which it might revert; while Visscher, by express contract, retained the title to his property as a security for the money to be paid him under the construction contract. That sum is shown by Visscher's testimony to have been at least one hundred thousand dollars besides interest. Trans., p. 17.

We respectfully refer to the case last cited as decisive of every question presented by the fourteenth assignment of error.

SAML F. RICE,
Att'y for Def't in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 207.

THE EAST ALABAMA RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN DOE EX DEM. VISSCHER AND OTHERS, DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

REPLY BRIEF FOR PLAINTIFF IN ERROR, CONTAINING AN APPENDIX WITH A PRINTED COPY OF A MS. CASE FROM ALABAMA.

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Attorneys of Plaintiff in Error.

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In the brief of Mr. Rice for the defendant in error two MSS. cases are cited from the supreme court of Alabama.

Fom one of these, the case of The Tenn. & C. R. R. Co. *vs.* The E. Ala. R'w'y Co., an ejectment case, and not the case of the same name cited from 73d Ala. R., the brief makes extracts only. These are given on pages 8, 9, 10, and 11 of the brief.

The other case is printed in full as an appendix to the brief, though referred to only once, on the question of estoppel.

We have thought it proper to print the whole of the case of the Tenn. & C. R. R. Co. and attach it as an appendix to our reply brief: first, that the Court may see that it has no value as reasoning; and, secondly, because it fully sustains our point, that the description of the subject-matter of the conveyances, in the deeds under which defendant in error claims title, is fatally defective.

These cases are cited triumphantly as conclusive authority, as the decisions of Alabama courts on questions of the Alabama law of real estate, and the course of procedure of Alabama courts for the recovery of real estate situated in Alabama.

We contend that they are in no sense authority in this case. That the case of Hooper *vs.* The Railroad Co. is not only faulty in its reasoning, but as it admits, questions or overrules settled decisions of the supreme court of Alabama, and that the case of the Tenn. & C. R. R. Co. *vs.* E. Ala. R'w'y follows blindly the opinion of Deady, J., in 5th Sawyer, without any other attempt at reasoning than mere extracts from opinions of other judges in cases by no means analogous to the present one. That they cannot be regarded as authority by this Court results from the fact that the plaintiff in error has a right to have his writ tested by the law as it stood and had been announced at the date of its writ, and from the additional fact that our writ of error had been sued out more than two years when the first of these cases was decided.

To adopt any other view would be to abdicate the powers

vested in your Court by the Constitution and laws, and to transfer them to the supreme court of Alabama. We insist that the supreme court of Alabama has no greater power to change the law of our case, after the date of our writ, by a decision, than its Legislature would have to do so by statute.

As they are thus shown to have no value as authority, let us now consider their value in other respects.

We address ourselves, first, to the case of Hooper *vs.* The R. R.

It will be observed that the justice who pronounced the opinion admitted that it questioned or overruled two cases—Pollard *vs.* Maddox, in 28 Ala. R., 328, and Sally Jones *vs.* The R. R.

The case of Pollard *vs.* Maddox had been the law of Alabama for nearly 30 years.

In that case a vague and indefinite grant by Maddox of the right of way for 100 feet in width through any of his lands in the county to lay out and build a railroad on was held to operate as an estoppel to defeat an action of trespass against the president of the railroad company, Pollard, who had, with the consent of plaintiff, built a railroad over his land.

The court held that this conduct of the plaintiff estopped him from maintaining trespass.

Here there was no pretext of a conveyance; a mere license, yet trespass would not lie, and the principles on which the actions of trespass and ejectment are founded are the same.

Then it questioned the Sally Jones case (Jones *vs.* R. R. Co., 68 Ala. R., 48), a more recent case, in which it was declared that a proprietor who stood by and saw a railroad built through his lands without demanding present payment

for the right of way (which by law he might do), must assert his remedy by an action for the recovery of the damages only, and could not maintain ejectment for the land on which the road was so built. He had cited Ch. J. Redfield and numerous cases in support of this proposition, and now demolishes them all by declaring that his former opinion was mere dictum!

The court seems to satisfy itself that estoppel *in pais* is no answer to ejectment, by declaring that there is no hardship in putting the railroad into chancery, and requiring it to sue out the extraordinary writ of injunction.

See Hooker *vs.* R. R., p. 4.

Is it any greater hardship to require the land owner to sue for his damages? In the one case, though the railroad is subject to a lien for the damages, there is an injury to the public. If a half mile of a railroad can be recovered in ejectment, the railroad will be stopped and travel and the mails delayed, and the very object of the Legislature in granting its charter be defeated.

The same reason that forbids the sale under execution of a part of a railroad operates to forbid ejectment under such circumstances, and to force the land owner to an action for his damages. He cannot be injured, for the railroad stands as a security for them. They say it will involve the sale of the railroad in either event if the damages are not paid. Yes; but a sale of the whole railroad in the case in chancery, while a part only may be recovered if the land owner is allowed to proceed in ejectment.

Had this opinion been pronounced before the *lis mota* in this action, we might well have questioned it; but as it

comes out more than two years after our writ of error, we can disregard it.

We now proceed to the case of the Tenn. & C. R. R. Co. *vs.* The E. Ala. R'w'y Co.

The court says that "the reason is, that the party complaining has only a right in common with the public, or with some other person or persons, to the use or occupation claimed. The right is a qualified, limited one, and in ordinary cases is not disturbed by another's similar occupation. It is but a privilege to go on the lands of another for a specified limited purpose, and has no element of exclusiveness in it. A right of way or common may be cited as illustrations of this privilege." (Appendix, p. 5).

Now, we submit that this reasoning is vicious—the reason given, is not the reason why ejectment will not lie for an easement—the real reason is that it is incorporeal, and cannot be the subject of possession. As the law books state it, an easement lies in grant, and not in seisin.

The party may not have a mere right in common with others; suppose the case of the inhabitants of a town who have an exclusive right of pasturage of a common—if there were only 10 of them they could not bring ejectment against the owner of the fee, though he might insist on pasturing his own cattle on it; every one knows that the value of pasturage to each inhabitant would be regulated by the number of cattle pastured. There may be elements of exclusiveness in it, and yet the action would not lie, as we see in the case of common of pasturage of the inhabitants of the town.

The case of Baer *vs.* Martin, reported in 8 Blackford, 317, had every element of exclusiveness in it. The right to maintain a great flume to carry water over another's land,

to a mill, is as exclusive as the right to maintain and operate a railway. Yet ejectment would not lie for its obstruction by the land owner.

The court cites Washburn on Easements, 3d Ed., pages 3, 260, and 270, and on examination in support of its proposition we find that these citations have no application to the subject whatever. It cites, also, Child *vs.* Chappel, 9 N. Y., 246; Morgan *vs.* Boges, 65 Maine 124, and 12 Am. Decisions, which, so far from supporting the proposition of the court above quoted, are strong authorities cited in our brief, to show that ejectment will not lie for any easement.

The next proposition of the court is that "lands claimed and condemned as road-bed and right of way of a railroad stand in a different category from ordinary easements. Over them is acquired not the right of use to be enjoyed in common with the public, or with other persons. The right and use are exclusive, and no one else has any right of way thereon."

This is equally faulty with the last. Every right of way is exclusive, in so far as that the owner of the servient estate is forbidden from so using it as in any manner to obstruct the way. But, if it does obstruct it, he becomes liable to an action on the case, or to be prevented by injunction, and not to ejectment.

The owner of the soil can make any use of it not inconsistent with the exercise of the right of way granted in the case of a railroad, as well as of any other right of way, and no owner can make any use of his land calculated in any degree to obstruct the enjoyment of the right. That the public are accommodated by a railroad, and that it has become a necessity, so to speak, of our existence, furnishes no

reason for inventing an illogical remedy for the railroad, for infringement of its right of way.

In fact the bill of rights of Alabama forbids the taking of anything more than the mere right of way.

The court (page 6, Appendix) cites the case of Conn. & Pass. R. R. *vs.* Holton, 32 Vermont, to show that trespass will lie for an obstruction of a right of way of a railroad, and therefore ejectment. But the difference between case and trespass has been practically abolished in Vermont, as they may be joined in the same action, and, besides, the only question argued was the question of the right to obstruct, and not the form of action, to vindicate the right of way. And a decision made without argument is of no value as authority.

Turner *vs.* Reynolds, 23 Pa. Stats., is also cited to show that ejectment will lie for an easement, but there the right was not only a right of way to carry coals, but also to dig them, and was a right in the soil itself, and not a mere easement.

The court then cites the case in 5 Sawyer, which it follows. Its reasoning, which is faulty, is taken from the opinion in that case and the case in 32 Vermont, so that, being worthless as authority and unsupported by reasoning, we may well venture to disregard it.

The case in 5 Sawyer, Benity *vs.* The R. R., was decided by Judge Deady, the district judge, and Circuit Judge Sawyer sat with him. In Wood *vs.* The Truckee Turnpike Co., in 24 Cal., he sat with far abler assistants, who came with him to a different conclusion.

The reasoning in the case of the Truckee Turnpike Co. is strong and the case was laboriously treated. It is consistent

with the principles of the common law as stated by Bracton, Fleta, Coke, Blackstone, Washburn, and Redfield. It is consistent with all the decisions made on the question up to that time, when the only cases which seemed to have been based on a contrary idea were the cases of White *vs.* Cin. and the other cases as to the rights of cities in streets dedicated to the public use as streets, and we submit, is far more worthy for its sound reasoning than the case in 5 Sawyer, fortified as it is by the concurrence of Judge Stone, and his adoption of its rule and reasoning in the case of the Tenn. and C. R. R., printed in the Appendix.

But Mr. Justice Stone, in this very case, decides the point made by us, as to the fatal defect in Visscher's deed from the sheriff arising from its failure to specify the property conveyed, or attempted to be conveyed, in such a manner as to pass a title—the right of way of the O. & O. railroad, so far as the same has been obtained, from Lafayette to the edge of Lee county.

See Tr., page 40–41, for the deed of Kellam, sheriff. Here we have no lateral limits, nothing to show the extent or boundary of the right, and Stone says that this is essential. See Appendix, pages 3 and 4. Perhaps this part of the opinion of Judge Stone was not agreeable to defendant in error, and he cited parts of Stone's MS. opinion, while he printed the whole of Sommerville's case of Hooper *vs.* The R. R.

In our brief we cited, on page 20, some authorities which, by typographic errors, are misleading. The second citation of Redfield on that page should be to the 2d instead of the 1st volume.

In this case we argued at the bar that the sale under execution of the railroad in Chambers county passed no title,

because a railroad constructed by a corporation under a charter from the State is an indivisible entity, and the very object of the State in granting extraordinary powers to the corporation, given because of the public use justifying the exercise in its behalf of the State's prerogative to take the right of way over lands for public use, would be entirely defeated if such a sale could be maintained.

The evidence shows the charter of the O. & O. railroad to build a railroad through several counties, a distance of about 100 miles; that they proceeded to acquire rights of way from near Opelikee to Lafayette, in the counties of Lee and Chambers, and constructed embankments, cuts, and culverts through two counties, with some intervals, a distance of about 20 miles. Becoming insolvent, judgments were rendered in favor of its contractors, and instead of applying to a chancery court to condemn the whole property in its unfinished condition (including the franchise) to the satisfaction of their judgments, the creditors proceeded to sell separately the portions of these works in the respective counties of Lee and Chambers, (in the only way they could so sell at law,) by sales made by the sheriffs of each county. Visscher bought at the sale the 12 miles in Chambers county.

Suppose, for instance, that Visscher had bought only the property in Chambers, and Sackett had bought the property in Lee county—

We should have had the case of a railroad divided into two sections, one owned by one man and the other by another, and depending for its completion on two distinct wills, with no franchise to take tolls—the only thing which gave a value to the right of way.

We cite, in support of our objection to the deed of the

sheriff on this ground, 53 Ala., p. 352, which is not in the original brief, the case having been there cited for another purpose, at different pages.

This question was treated in the case of Gue *vs.* The Tidewater Canal Co., 24 Howard, 262–3–4.

Chief Justice Taney holds that the property of a corporation chartered as a public carrier, so closely connected with the objects of its creation as that its sale would interfere materially with the discharge of its duties to the public, cannot be levied on and sold under *fieri facias.*

No sale can be made of such property apart from the franchise, which alone gives it value.

The only way it can be sold is by decree of a chancery court, which can order the sale as an entirety, thus saving at once all the rights of creditors, and preserving at the same time those of the public.

In the same case he shows how impossible it is, to convert a thing incorporeal into the subject of a sale under execution.

Practically he overrules the case in 5 Iredell, cited in the brief of counsel.

In 13 Serg't & Rawle, 210, the same question is treated and the same conclusion arrived at.

In Hammock *vs.* The Loan & Trust Co., 105 U. S., 91, Mr. Justice Harlan, commenting on the case of 24 Howard, remarks: "It is a partial modification of the general rule that the property of a railroad corporation used for necessary railroad purposes cannot be seized and sold under an execution at law."

We have thought it best to cite again some of the author-

ities cited on page 20 of our brief, as many of them are, from typographic errors, apparently irrelevant.

1 Redfield, R'w'ys, 4th ed., p. 248.

2d Redfield, R'w'ys, 4th ed., p. 545.

That the property of a railroad company necessary to the conduct of its business cannot be sold under execution.

2d Redfield, R'w'y, 4th ed., p. 491, note.

The case in 13 Serg't & Rawle is cited and approved on page 492, note.

See Rus *vs.* Lauhes, 12 Am. Decisions, pages 295, 296.

Ejectment cannot be maintained for a ferry and the river banks.

This is an easement which was certainly exclusive enough.

2 Wait's Actions and Defences, 746–7.

3d ed. Washburne on Easements, 9, 629, 395, 398, 693.

Wagner *vs.* Chuland, in 10 Am. Reports, page 774, is a well-considered case in which the nature of the rights of the holder of the easement of a right of way for a railroad is considered, is by an able court, and was well argued. Also reported in 22 Ohio Stats., 563.

All which is respectfully submitted.

EDWARD PATTERSON,
HARRY C. SEMPLE,
Attorneys of Plaintiff in Error.

APPENDIX.

SUPREME COURT OF ALA. DECEMBER TERM, 1883.

7 Div. No. 434.

Appeal from Etowah Circuit Court.

TENNESSEE AND COOSA RAILROAD COMPANY

vs.

EAST ALABAMA RAILWAY CO. *et al.*

STONE, J.:

The present is an action of ejectment brought by the appellant as plaintiff and seeks to recover what is described in the complaint as the following real estate, that is to say, "the track or road-bed of the plaintiff, as the same was located at and before July 12th, 1871, from Gunter's landing, in Marshall county, in the State of Alabama, to Gadsden, in Etowah county, in said State, together with all their rights of way, grading, trestles, masonry work, culverting work, and property on said line so located, including the railroad from Gadsden to Attalla, in said county of Etowah, which railroad is the only railroad from Gadsden to Attalla, and is attached to the soil, and is now, and was at the commencement of this suit, used and operated as a railroad by the employees of the defendant corporation, and by the direction and authority of that corporation, and including also the appurtenances of said railroad from Gadsden to Attalla."

The plaintiff further avers "that at and before June 3d, 1856, it was organized and in existence as a coporation under

and by virtue of its charter contained in an act of the General Assembly of the State of Alabama, entitled An act to incorporate the Tennessee and Coosa Railroad Company, approved January 16th, 1844," a copy of which act was made part of the count.

See Pamph. Acts 1843–4, pp. 170 to 175.

The complaint further averred "that long before June 3d, 1856, the said railroad and railroad track and bed of plaintiff, as described in this complaint, had been located as stated in this complaint, and that said railroad of plaintiff's was, and is, the same railroad which is first mentioned in the act of Congress entitled An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State, approved June 3d, 1856, and plaintiff further avers that at the time of said location of its said railroad and railroad track and bed there were public lands in the United States designated by odd numbers not previously sold or claimed by any pre-emption claim on and along the said railroad and railroad track and bed, some of which public lands were situated between Gadsden and Attalla aforesaid. * * * And plaintiff avers that its said railroad and railroad track and railroad bed, as located as aforesaid between Gadsden and Attalla, * * * was upon parts and parcels of some of said odd numbered sections of said public lands upon and over which the plaintiff had a right to locate its said railroad, railroad track, and railroad bed, and did so locate the same in the lawful exercise of its right." By various rulings in the court below, the contention was narrowed down to that section of the road about five miles in length, extending from Gadsden, the southern terminus of plaintiff's chartered line, to Attalla, all in Etowah county. Hence we have omitted several averments not deemed material to the present investigation. The complaint contains the usual averment of ouster and possession by the defendants, and

claims damages. There was a second count containing averments not found in the first, as follows: "The plaintiff, on and before the 12th day of July, 1871, had, and ever since has had, the legal title and legal ownership of the following realty [describing the property as described and sued for in the first count], and is upon the ground and soil and upon the aforesaid right of way of the plaintiff and is the property of the plaintiff." * * *

"And plaintiff avers that its aforementioned legal title to and ownership of all the property above described was acquired by the plaintiff lawfully and properly, but without the exercise of any power to cause the condemnation of lands to the use of a railroad or to any public use, and without the exercise of any other compulsory power authorized by the law of Alabama, and without any other means than the lawful and voluntary acts and conduct of those who were the owners of said property until it became the property of the plaintiff."

In setting forth the counts as given above, we have described them as they were finally framed, after all the amendments were allowed. Under the plea to the jurisdiction filed by the defendants, the court required the plaintiff to strike from the complaint all of the property claimed which lay in Marshall county. The circuit court also ruled that, with the exception of the five miles of road extending from Gadsden to Attalla, the description given in the complaint is too indefinite to authorize a recovery. In this way the controversy was narrowed to the completed section between those places. Several grounds are urged by the appellee why the ruling of the circuit court should not be disturbed: First, that the description of the property sued for is too indefinite and fails to give such information that the sheriff would know of what to put the plaintiff in possession if he recovered. As we understand the complaint there is a marked difference in the description of that part of the road which lies between Gadsden and Attalla and

that which undertakes to describe the residue of the route. The description of the latter portion must be classed with those held insufficient in Sturdevant *vs.* Morrell, 8 Part., 319, and Bennett *vs.* Morris, 9 Part., 171. There is nothing in the description, without additional facts not given, which would inform the defendant of what was claimed, or the sheriff what he was required to put the plaintiff in possession of. The mere survey and location of the line of a railroad without more, made twenty-five years ago, cannot be supposed to have left such visible marks as to enable one to trace it without the aid of the engineer's report and chart, even if it could be done with such aid.

See Alexander *vs.* Wheeler, 69 Ala., 332.

The description of that part of the road from Gadsden to Attalla is entirely different. It is so described that its identity cannot be easily mistaken. A railroad track, not only surveyed and located, but cleared of timber and graded, having excavations and embankments extending from one given point to another given point, and being the only such road between those points, it would seem the sheriff would have no difficulty in finding. And when in addition to these there is a superstructure and locomotives and cars running over the track assurance is made doubly sure.

Henly *vs.* Branch Bank at Mobile, 16 Ala., 552.
Chapman *vs.* Holding, 60 Ala., 522.

The description of what is called the right of way, that area of the servitude which lies outside of the graded track, is not sufficiently described. Its dimensions should have been given as a guide to the jury and to the officer executing the writ of possession. It is objected in the next place that plaintiff has not sufficient property in the realty to maintain ejectment; that plaintiff has only an easement, and not a title to the soil, and that ejectment will not lie for the recovery of an easement.

It is true that ejectment will not lie as a general rule for an easement or to be let unto the use or occupation of a servitude. The reason is that the party complaining has only a right in common with the public, or with some other person or persons, to the use or occupation claimed. The right is a qualified limited one, and in ordinary cases is not disturbed by another's similar occupation. It is but a privilege to go on the lands of another for a specified limited purpose and has no element of exclusiveness in it. A right of way or of common may be given as illustrations of this principle.

Washb. on Easements, 3d ed., 3, 260, 270.
Child *vs.* Chappel, 9 N. Y., 246.
Morgan *vs.* Boges, 65 Maine, 124.
Rees *vs.* Lawless, 12 Amer. Dec., 295.

There are cases which go beyond this doctrine.

Wood *vs.* Truckee Turnpike Co., 24 Cal., 474.
Union Canal Co. *vs.* Young, 30 Amer. Dec., 212; 2 Wait A. C. & Def., 747; 2 Redf. Rug., 553.

Lands claimed and condemned as road-bed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired not the right of use to be enjoyed in common with the public or with other persons. The right and use are exclusive and no one else has any right of way thereon.

M. & O. R. R. Co. *vs.* Williams, 53 Ala., 595.
M. & M. R'w'y Co. *vs.* Blakely, 59 Ala., 471.
Tanner *vs.* L. & N. R. R. Co., 60 Ala., 621.
L. & N. R. R. Co. *vs.* Pilgrim, 62 Ala., 305.
Cook *vs.* Cen. R. R. & Banking Co., 67 Ala., 533.
R. & G. R. R. Co. *vs.* Davis, 2 Der. & Bot. Law, 451.
Jackson *vs.* R. & R. R. R. Co., 25 Ver., 150.
T. & B. R. R. Co. *vs.* Potter, 42 Ver., 265.

Ejectment was originally classed as a possessory action. Hence it was that at common law any number of actions could be maintained by laying the demise at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession in form legal, as distinguished from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterwards found in possession, unless the latter can show a paramount title or a possession continuous, peaceable, and adverse of sufficient duration to toll entry.

Tyler on Ejectment, 70 W., 165.
Anderson *vs.* Mellar, 56 Ala., 621.

A lessee or termor, during the continuance of a valid lease, may maintain the action against the lessee, although owner of the entire fee less the term. So the title of a railroad corporation to the possession of the soil covered by the road-bed and right of way will, after condemnation, dominate all adverse claim of possession even by the owner of the fee. Although the right which a railroad company acquires to land taken under their charter is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety, require that the possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used.

Conn. & Pass. Rivers R. R. Co. *vs.* Holton, 32 Vermont, 43.

One who has the exclusive right to mine coal upon a tract of land has the right of possession as against the owner of the soil, so far as it is necessary to carry on his mining operations.

Turan *vs.* Reynolds, 23 Penn. St., 199, 206.

The right of municipal corporations or public authorities, vested with no higher estate than a public easement or right

by dedication to invoke the remedy of ejectment for the possession of streets, public squares, town commons, church and market grounds, is upheld in many cases.

Sedg. & Wait, Trial of Title to Land, 271.
See also Jackson *vs.* Saxton, 16 Johns., 184.
Winona *vs.* Huff, 11 Minn., 119.
Cincinnati *vs.* White, 6 Pet., 431.
Drummer *vs.* Jersey City, 40 Amer. Dec., 213.
Hoboken Land Co. *vs.* Mayor, 36 N. J. Law, 540.
Doe *ex dem. vs.* Booth, 2 Bos. & Pul. 219.
3 Wait, Ac. & Def., 6, 7.

In the following cases will be found a curious discussion tending strongly to show that the road-bed and superstruction, in fact, everything attached to the soil on which a railroad is built, are considered realty:

Randall *vs.* Elwell, 52 N. Y., 521.
S. C., 11 Amer. Rep., 747.
Hoyle *vs.* P. & M. R. R. Co., 54 N. Y., 374.
S. C., 13 Amer. Rep., 595.

And there is certainly much reason for the opinion. The road-bed and right of way are as immovable as the soil itself. The superstructure is attached to the soil, and the corporation has the exclusive right to the possession of it.

In Central Pacific R. R. Co. *vs.* Benity, 5 Sawyer, 118, the precise question we are considering was presented, and the court, Circuit Justice Sawyer participating, decided the action of ejectment would lie. So we hold it will be in this case. If it be contended for the appellee that the Tennessee and Coosa Railroad Company is not shown to have ever acquired any right to the property sued for, shows no legal rights to it, and therefore cannot maintain this action, the answer is, the main defendant, on whose title all the defendants rely, acquired its possession and all the claim it asserts

derivatively from the plaintiff, and cannot be heard to dispute its title.

Tyler on Ejectment, ch. 9, p. 165.
Houston *vs.* Farris, 71 Ala., 570.

The East Alabama and Cincinnati Railroad Company obtained a charter for constructing a railroad from Eufaula, in Barbour county, to Gunter's Landing, sometimes called Guntersville, on the Tennessee river and in Marshall county. This company organized, and, proposing to obtain the State's endorsement of its bonds, executed to trustees a trust deed of all its property then owned or afterwards to be acquired, to indemnify the State against loss by virtue of such endorsement. It issued its bonds, which, being endorsed by the State, were negotiated for a fund with which to prosecute the construction of its road.

The Tennessee and Coosa Railroad Company had previously obtained a charter for a railroad extending from Gadsden on the Coosa river to Gunter's Landing, being in the route, and extending part of the distance from Eufaula to Gunter's Landing. This older company, extending from Gadsden to Guntersville, had surveyed and located its route, and had done some grading, masonry, and other work along its line, but had laid no rails. Work was suspended for want of funds. At this stage of its progress, and after the said trust deed of the East Alabama and Cincinnati Railroad Company had been executed, an agreement of bargain and sale was entered into between the two corporations, by which the Tennessee and Coosa Railroad Company contracted to sell to the East Alabama and Cincinnati Railroad Company its entire unfinished railroad, with all its property. That contract bears date July 12th, 1871. In the case of Tennessee and Coosa Railroad Company *vs.* East Alabama Railway Company (73d Ala.,) a chancery suit, we construed that contract of sale, and held that the conditions in the contract are what are called precedent, and that

the title (to the railroad and its property), as between the contracting parties, did not pass by that instrument by reason of the non-performance of the conditions.

In that case, and in Colt *vs.* Barnes, 64 Ala., 108, will be found a statement of many of the facts which go to make up the history of this case.

In 1873 the East Alabama and Cincinnati Railroad Company was declared a bankrupt, assignees were appointed, and the property of the bankrupt was vested in them as such assignees. They sold the property to Murphy and others, and made them a deed of conveyance. Under this purchase Murphy and his associate purchasers took possession of the property of the East Alabama and Cincinnati Railroad Company, and with it that portion of the Tennessee and Coosa railroad which had been completed and was being operated by the bankrupt corporation under its purchase of July 12th, 1871. They retained possession for two or more years, until dispossessed by the chancery suit of Barnes and Clewes, trustees to foreclose the trust deed given to secure the State and the bondholders. (See Colt *vs.* Barnes, 64 Ala., 108, for the report of that case.) Under that suit the entire effects of the East Alabama and Cincinnati Railroad Company were sold, and the appellee in this case, the East Alabama Railway Company, became the derivative purchasers, asserting title under said sale and purchase. The said purchasing company claims as part of its said purchase the property, road-bed, right of way, and superstructure of the Tennessee and Coosa Railroad Company, and has possession of it since said purchase, the actual possession being only that section extending from Gadsden to Attalla. In the suit by Barnes and Clewes, trustees to foreclose the trust deed, no special separate mention is made of that section of the railroad track which was acquired from the Tennessee and Coosa Railroad Company, nor was the latter-named corporation made a party to the suit. The defendant corporation purchased the entire property, road-bed,

right of way, and everything else belonging to the East Alabama and Cincinnati Railroad Company, and claims that the property in controversy in this suit is part of that property.

It is contended for appellee that under the bankruptcy in the case of the East Alabama and Cincinnati R. R. Co., the bankrupt court and its assignees took control and possession of the property in controversy as of the assets of the bankrupt that under a petition filed in the court for the purpose, the bankrupt estate, including the property herein sued for, was sold and conveyed to Murphy and his associates; that they took possession under their purchase; and that plaintiff is bound, under § 5057 of the Revised Statutes of the United States, because it did not prefer its claim within two years, and in that court. The present record does not contain the petition filed by the assignees in the bankrupt court under which they obtained the order of sale. The order of the district court authorizing the sale is in the record, and it recites the substance of the petition and sets forth the parties to it. The recital is that the assignees—naming them—were the petitioners, and that Barnes and Clewes, the trustees in the deed of trust, were alone made defendants. They accepted service and consented to the hearing of said petition, and to a sale, as prayed therein, of the franchises and property of the said East Alabama and Cincinnati Railroad Company.

The court thereupon ordered that the lien of the State of Alabama under the mortgage or deed of trust of date July 1st, 1870, * * * to secure the State of Alabama against its endorsement of the first mortgage bonds of said railroad company and the holders and owners of said first mortgage bonds, * * * be, and the same is hereby, in all things, recognized and established as a prior lien on the franchises and property, real and personal, of said railroad company."

The decree then directed a sale of said property, subject to the prior lien aforesaid in favor of the State of Alabama and

the holders and owners of the first mortgage bonds, * * * and that the entire road, its franchises and property, * * * be sold by said assignee free from all other liens except the liens aforesaid in favor of the State of Alabama and the holders and owners of said first mortgage bonds.

The decree then directed that the sale be reported to, and the proceeds be brought into, the court. Under this order the East Alabama and Cincinnati railroad, its franchises and property, were sold and conveyed to Murphy and his associates. This is the proceeding in which it is contended that the Tennessee and Coosa Railroad Company should have intervened and asserted its claim; and failing to do so for two years it is barred. The authority of the assignee to sell the property of the bankrupt under the bankrupt law of 1867 may be reduced substantially to two methods: first, a sale without an order of court; in which case the assignee sells simply the unascertained interest of the bankrupt, leaving to the purchaser the right and duty of settling and determining all controversies as to disputed ownership and all litigation that may grow out of such disputed ownership. Section 5063 of the Revised Statutes provides a second method. Its language is: "Wherever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall receive the funds in place of the estate disposed of, and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court; but this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale."

It is manifest from a perusal of this section that it contemplates a sale of the entire property and the entire title to it freed from all conflicting claims and liens, and to place and leave its proceeds in its stead as the subject of contention and litigation. Hence it declares that its proceeds shall be considered the measure of its value in any suit or controversy between the parties. How can such inquiry arise or how can the question of value become material as a factor in adjusting conflicting claims unless that value is ascertained by a sale of the entire title to the entire property? Sales under decree of court guaranteed under this section are classed as sales free from encumbrance, because, no matter what may be the state of the conflicting claims and rights, the purchaser gets a good title and leaves the contestants to litigate over the money proceeds.

The order of sale in this case did not conform to section 5063 of the Revised Statutes, because it did not order the sale of the entire title. It simply ordered a sale of the residium of ownership beyond the prior lien and claim of the State and the bondholders under the first mortgage. There is no provision in the act of Congress for granting such order, and the consequence claimed as the result of such sale has no statutory ground to rest on. The entire system is the creation of statute and cannot be extended beyond its terms. There is no middle ground between the two methods of sale the assignee is authorized to resort to.

Again: to bring a case within section 5063, Rev. Stat., the order of sale can only be granted *after such notice to the claimant as the court shall deem reasonable.* In this case there was not only no notice to the claimant, The Tennessee and Coosa Railroad Company, but its very existence was ignored in the proceedings. Notice was indispensable, as declared in many courts of the highest authority, and, among them, many rulings of the United States Supreme Court.

Ray *vs.* Norseworthy, 23 Wall., 128.
Stickney *vs.* Will, W., 150.
Bump on Bankruptcy, 10 ed., 619, '20.

As was said in Glenny *vs.* Langdon, 98 M. L., 20–31, "neither the assignee nor any creditor can have any greater right under the bankrupt act than the act itself confers." And in Yeatman *vs.* Savings Institution, 95 U. S., 704–6, it was said: "Except in cases [enumerated, but this is not one of them] the assignee takes the title subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt, which excited against the property in the hands of the bankrupt."

Stewart *vs.* Platt, 101 U. S., 731.

Dudley *vs.* Easton, 104 U. S., 99.

Rhodes *vs.* Blackiston, 106 Mass., 334, S. C.; 8 Amer. Rep., 332.

Shaw *vs.* Lindsey, 60 Ala., 334.

In the chancery suit between parties (in 73d Alabama,) we showed that by failure to perform conditions precedent the East Alabama and Cincinnati Railroad Company never acquired title to the Tennessee and Coosa railroad. We showed further that, by the bankruptcy of the former company, it had become unable to comply with its contract and thus acquire the title. It was, therefore, in possession by no title, legal or equitable. In this condition the claim of the bankrupt, if claim there was, devolved on the assignees. "If * * the property has not been conveyed in fraud of creditors, he [the assignee] has no greater interest in or better title to it than the bankrupt."

Donaldson *vs.* Farewell, 93 U. S., 631.

Having gone into the possession under an executed contract of purchase the E. A. & C. Railroad Company was estopped from disputing the title of the plaintiff corporation, and the assignee, standing in the bankrupt's shoes was equally estopped. And both the bankrupt and the assignees being in by no right, we are at a loss to know how the East Alabama Railroad Company, which is in no way connected

with that possession and derives no title from the assignees, can claim any benefit therefrom.

Wilson *vs.* Glenn, 68 Ala., 363.

There is another view; section 5057 of the Revised Statutes applies the two years' statute to suits touching property or rights of property, transferable to or vested in the assignee. "It extends no further. The bankrupt corporation having no property or right of property in the subject of this suit, it neither vested in nor was it transferable to the assignees."

Porter *vs.* Laigear, 109 U. S., 84.

The plaintiff can recover only to the extent the defendant is shown to have occupied its previously located road-bed and right of way.

The judgment of the circuit court is reserved and the cause remanded.

Brickell, C. J., not sitting.